a decision on this purely preliminary question is held to be an exercise of the judicial discretion. It is said that to entertain the writ of mandamus would amount to a complete review of the case below and an abuse of the discretion of the intermediate court, but this can hardly be true since the question before the highest court involves merely the sufficiency or insufficiency under the constitution and statutes of the appeal as taken. A further reason for refusing to issue mandamus is found, according to these cases, in the desire on the part of the highest court to keep from being overwhelmed by applications for the writ.

THE CONSTRUCTION OF THE TERM INSOLVENT AS USED IN § 3a(4) OF THE BANKRUPTCY ACT.—A general assignment for the benefit of creditors constitutes in itself an act of bankruptcy.[1] The solvency or insolvency of the assignor at the time the assignment was executed or at the time the petition was filed is immaterial.[2] Prior to the amendment of 1903 this was the only act of bankruptcy set out by § 3a(4). It was also held that the fact that a receiver or trustee had been put in charge of a debtor's property did not constitute an assignment for the benefit of creditors and therefore was not an act of bankruptcy.[3] In view of these decisions the practice grew up of having receivers or trustees appointed for insolvent estates, instead of making general assignments, and thus evading the provision of § 3a(4) of the act. But in 1903 an amendment was added to this section to provide for just such cases and to give the creditors an opportunity to have the insolvent estate of the debtor administered under the bankruptcy act. This amendment provided that a person shall be guilty of an act of bankruptcy if "being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

It is evident from the language of the statute that the fact that a receiver or trustee has been applied for or put in charge of the debtor's property is not in itself an act of bankruptcy. Whether or not he was insolvent at the time of his application for a receiver, whether or not a receiver was put in charge because of insolvency, are the essential considerations.[4] And whether the debtor's insol-

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by Baskin, J. Treadway *v.* Wright, 4 Nev. 119; Andrews *v.* Cook, 28 Nev. 265, 81 Pac. 303. This latter case expressly approves the Buckley case, *supra,* but both of these Nevada cases are expressly overruled in the recent case of Floyd *v.* District Court, *supra.*

[1] Bankr. Act, § 3a(4); Clark *v.* Mfg. & Enamel Co., 101 Fed. 962, 4 Am. B. R. 351.

[2] West Co. *v.* Lea, 174 U. S. 590; Leidigh Carriage Co. *v.* Stengel, 95 Fed. 637, 2 Am. B. R. 383.

[3] In re Empire Metallic Bedstead Co., 98 Fed. 981, 3 Am. B. R. 575; Vaccaro *v.* Security Bank Co., 103 Fed. 436, 4 Am. B. R. 474.

[4] Blue Mt. Iron & Steel Co. *v.* Portner, 131 Fed. 57, 12 Am. B. R. 559; Hooks *v.* Aldridge, 145 Fed. 865, 16 Am. B. R. 664.

vency in such cases is to be determined by the state rule or the definition in the bankruptcy act is the subject of much conflict.

In the first instance where the debtor himself applies for a receiver or trustee the essential element of the act is "being insolvent" at the time. The act defines when a person is deemed to be insolvent.[5] Therefore the debtor must be insolvent according to this definition, and it is not sufficient to prove that he is insolvent according to the usual acceptation of the term, namely, unable to pay his debts as they mature in the usual course of business.[6] Furthermore this fact is to be determined by the bankruptcy court.[7]

It is to be observed, however, that when the act of bankruptcy complained of is the latter part of § 3a(4), "because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States," the essential feature is that the receiver or trustee was put in charge "because of insolvency" and not the fact that the debtor is insolvent.[8] The burden of litigation in these cases is over the definition of insolvency, whether the state rule as to insolvency or the definition in the bankruptcy act is to be applied.

The recent case of *In re Wm. S. Butler & Co.*, 207 Fed. 705, held that the definition of the term insolvency as given in § 1a(15) of the bankruptcy act is the one to be applied in determining the meaning of the term as used in § 3a(4). It would seem, however, to be the better view on both reason and authority that by insolvency as used in § 3a(4) is meant insolvency as understood and applied by the courts appointing the receiver or trustee "under the laws of a state, of a territory, or of the United States," and not necessarily as defined in the bankruptcy act.[9] For when we look at the reason for the adding of this amendment and that it relates to proceedings in courts of equity and common law it may be assumed that in describing those proceedings it used the language of those courts and in the light of the construction placed upon it by those courts. And no court of equity or common law has ever in appointing receivers or trustees used the term insolvency in the special sense as defined by the bankruptcy act.[10] Thus to give the term insolvency as used

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[5] Bankr. Act, § 1a(15), provides that "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

[6] Exploration Mercantile Co. *v.* Pac. Hdw. Co., 177 Fed. 825, 24 Am. B. R. 216.

[7] In re Douglass Coal & Coke Co., 131 Fed. 769, 12 Am. B. R. 545.

[8] In re Spalding, 139 Fed. 769, 14 Am. B. R. 129; In re Douglass Coal & Coke Co., *supra*.

[9] In re Pickens Mfg. Co., 158 Fed. 894, 20 Am. B. R. 202; In re Douglass Coal & Coke Co., *supra*. But see *contra* In re Golden Malt Cream Co., 164 Fed. 326.

[10] See dissenting opinion In re Wm. S. Butler & Co., *supra*.

in § 3a(4) such a meaning would be to defeat practically the very purpose of the amendment.

A state court may appoint a receiver or trustee to take charge of a debtor's property on many grounds, one of which may be his insolvency. In such cases the court is governed by the laws of the state in determining the question of insolvency, which may not be and in fact generally is not the same rule as that defined in the bankruptcy act. But the act itself provides that if the meaning of any term as defined by it shall be inconsistent with the context such definition shall give way and the term construed in consistency with the meaning of the context.[11] Therefore in view of this provision it would seem that Congress by adding the words "under the laws of a state, or a territory, or the United States," to this clause, intended that those laws, and not the bankruptcy act should govern in determining the question of insolvency.[12] The fact that it is now settled that the phrase "law of a state" as used in § 3a(4) is not limited to the statute law but also includes the appointment of receivers or trustees where the court is acting under its general equity power, would also seem to give weight to this view.[13]

The appointment of a receiver or trustee "because of insolvency" is the essential factor of this act of bankruptcy, but whether the receiver or trustee was put in charge of the debtor's property "because of insolvency" depends upon the state of facts disclosed upon the record in the case before the court appointing the receiver or trustee.[14] And if the order of the court recites the grounds of appointment, the recital cannot be contradicted without impeaching the record and this is not permissible.[15] But if the record does not show that the debtor was insolvent the bankruptcy court is precluded from considering evidence *aliunde* to show his insolvency.[16] Therefore it follows that the finding of the state court as to insolvency is conclusive, and as they apply their rule as to insolvency in the appointment of receivers it would seem that this is the construction to be given to the term insolvency as used in § 3a (4), and not the one as defined in the bankruptcy act.

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[11] Bankr. Act, § 1a.

[12] LOVELAND, BANKRUPTCY, §§ 154, 156.

[13] Lowenstein *v.* Mfg. Co., 130 Fed. 1007; In re Kennedy Tailoring Co., 175 Fed. 871, 23 Am. B. R. 656.

[14] Beatty *v.* Anderson Coal Min. Co., 150 Fed. 293, 17 Am. B. R. 738; In re Pickens Mfg. Co., *supra*.

[15] In re Watts & Sachs, 190 U. S. 1.

[16] Blue Mt. Iron & Steel Co. *v.* Portner, *supra;* In re Ellsworth Co., 173 Fed. 699, 23 Am. B. R. 284.